No. 85-495

In The
Supreme Court of the United States
October Term, 1985

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,

vs.

RONALD PHILBROOK, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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I. BECAUSE THE LEAVE PROVISIONS ON THEIR FACE TREAT EMPLOYEES' RELIGIOUS AND SECULAR CLAIMS FOR PAID LEAVE IN AN EQUAL MANNER AND PHILBROOK HAS NOT SHOWN THAT THEY HAVE BEEN APPLIED IN A DISCRIMINATORY FASHION, PHILBROOK HAS NOT ESTABLISHED A PRIMA FACIE CASE OF DISPARATE TREAMENT ON THE BASIS OF RELIGION.

Philbrook argues that the leave provisions of the collective bargaining agreement facially discriminate on the basis of religion in violation of Title VII and that the Court need only decide whether the court of appeals was correct in reversing the district court's judgment and remanding the case to that court for appropriate findings. In support of his claim, Philbrook notes that while the leave provisions provide three days of paid leave to observe mandatory religious holidays, the provisions which afford three days of paid leave to attend to necessary personal business discriminatorily prohibit use of such leave for "any religious observance." The record, however, permits only the conclusion that the leave provisions, as applied to Philbrook, are facially neutral; therefore, remand of this case to the district court is inappropriate under *Pullman-Standard v. Swint*, 456 U.S. 273, 301 (1982).

A. The leave provisions are facially neutral.

The leave provisions, when construed as a whole, treat employees' religious and secular claims for paid leave in

an equal manner.[1] In this connection, the thrust of the restrictions on the use of necessary personal leave is to disallow the taking of such leave for reasons for which paid leave is provided under other provisions of the agreement, and thus to prohibit necessary personal leave from being interchangeable with other forms of paid leave. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 488 (2d Cir. 1985) (Pollack, D.J., dissenting), *cert. granted*, 106 S.Ct. 848 (1985) (App. to Pet. for Cert. at 22a). Philbrook suggests that the personal leave provisions foreclose use of necessary personal leave for any activity which contains a religious component. See *Brief for Respondent* at 15-16. But the leave provisions do not expressly foreclose activities that have such a component; further, Philbrook has produced no evidence that there are any such activities which would not fall within the personal leave provisions.

[1]It has been recognized by this Court that the terms of a collective bargaining agreement must be construed, not in isolation from other provisions, but as a whole in light of practice, usage and custom to effectuate the intent of the parties. *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157 (1966); *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270 (1956). And such a construction in this case is not tantamount to an assertion of a "bottom line" defense rejected by this Court in *Connecticut v. Teal*, 457 U.S. 440 (1982). In *Teal*, this Court held that the overall employment policies which favored minorities could not defeat the claims of individual members of a protected class. In the present case, the leave provisions protect both the individual religious employees and religious employees as a group. Although Philbrook and certain amici suggest that Jewish teachers are given preferential treatment because they have all the time off they need for religious holidays, there is no evidence in the record to support this suggestion. Indeed, the record indicates that at least one Jewish teacher was required to take unpaid leave beyond that available in the collective bargaining agreement in order to have all the time off she needed for religious observance. (J.A. 54-55)

For example, the necessary personal leave provisions on their face treat equally a teacher who requests leave for crisis counseling performed by a minister and a teacher who requests leave for such counseling performed by a therapist. The leave in either case could be characterized as being for necessary personal business. Philbrook, therefore, has no more of a right under Title VII to be relieved of the restrictions imposed on the use of personal leave than another employee has the right to use for secular purposes three days of paid leave otherwise afforded for the observance of holy days. To conclude otherwise would lead to preferential treatment on the basis of religion.

B. Philbrook has not shown that the leave provisions have been applied in a discriminatory manner.

Even if Philbrook's claim that the prohibition against the use of necessary personal business leave for "any religious observance" constitutes facial discrimination is accurate, Philbrook has the burden of proving that the agreement *as applied* discriminates against him, a burden which he has failed to meet. This is the case because a collective bargaining agreement which in the abstract discriminates against classes protected under Title VII, but as applied does not result in discriminatory treatment, presents no justiciable case or controversy under Article III of the United States Constitution. Cf. *Poe v. Ullman*, 367 U.S. 497, 504-5 (1961) (plurality opinion). In this connection, there is *no* evidence in the record that Philbrook sought to use necessary personal business leave for re-

ligious observance other than for the observance of mandatory religious holidays.[2]

Philbrook implies impermissible motive based upon a claim that the religious leave provisions favor Jewish teachers and upon the prohibition in the necessary personal leave provisions against the use of such leave for "any religious observance." However, in determining impermissible motive, the Court should consider the alternatives available to the school board in providing paid leave for religious observance. The parties to the collective bargaining agreement could have negotiated a leave provision which does not differentiate between secular and religious needs of employees by granting three days of paid leave to attend to necessary personal business without restriction. Such a provision would insulate the school board from Philbrook's claim of illicit, facial discrimination. However, under such a "neutral" leave provision, Philbrook would receive fewer days of paid leave than he presently receives under the "facially discriminatory" provision contained in the governing collective bargaining

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[2]Amici, the United States and Equal Employment Opportunity Commission, contend that the necessary personal business leave provisions might be discriminatory if they are applied broadly and such leave is permitted for any non-religious reason. Philbrook, however, has failed to establish such broad application; in fact, petitioners have established on the record that the leave provisions at issue are narrow in scope and strictly enforced. (J.A. 51-54, 61, 64-65, 145-146) Philbrook had the opportunity to present contrary evidence, but has failed to do so. He should not be given a second opportunity to litigate this issue. Cf. *American Propeller & Mfg. Co. v. United States,* 300 U.S. 475 (1937). Additionally, under the *Pullman* case, remand is improper because the record permits only one resolution of the factual issue concerning application of the personal business leave provisions.

agreement. And even if such a "neutral" provision were adopted, Philbrook could still argue that he has been discriminated against because he would be forced to use personal leave for religious reasons while other employees who already had time to observe the traditional holidays would be free to use all personal leave for secular business.

II. PHILBROOK HAS NOT ESTABLISHED THAT A CONFLICT EXISTS BETWEEN THE JOB ATTENDANCE REQUIREMENTS AND HIS NEED TO BE ABSENT FROM WORK OR THAT HE HAS SUFFERED A DEPRIVATION AS A RESULT OF THE SCHOOL BOARD'S LEAVE POLICIES.

While the respondent bases his case on a claim of facial discrimination, some of the amici, instead, focus on whether a *prima facie* case has been established. It is the position of the petitioners that the court of appeals should have affirmed the district court's ruling that Philbrook failed to establish a *prima facie* case of religious discrimination in the school board's refusal to grant him more than three days paid leave to observe religious holidays occurring during the work year. This is the case because Philbrook failed to meet the first and third prongs of the three-prong test applied by the court of appeals in determining whether Philbrook was subject to religious discrimination.[3]

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[3]The court of appeals interpreted Title VII to require that Philbrook prove the following elements: (1) he has a bona fide religious belief that conflicts with an employment requirement; (2) he has informed the employer of this belief; and (3) he was disciplined for failing to comply with the conflicting employment requirement. *Philbrook v. Ansonia Board of Education,* 757 F.2d 476, 481 (2d Cir. 1985), *cert. granted,* 106 S.Ct. 848 (1985) (App. to Pet. for Cert. at 9a).

With regard to the first prong, Philbrook has not shown that a conflict exists between the job attendance requirements and his need to be absent from work to observe holy days. No conflict between the job attendance requirements and Philbrook's religious practices has arisen because the job attendance requirements have been waived in that Philbrook has been granted three days of paid leave and an unlimited number of days of unpaid leave to observe holy days.[4]

With regard to the third prong, Philbrook has failed to show that he has suffered a "deprivation" for failing to comply with the job attendance requirements. Philbrook has not suffered a deprivation in any sense of the word; rather, he has been denied a day's pay for a day not worked, a result uniformly applied to all Ansonia teachers who take more days of leave than are afforded under the governing collective bargaining agreement.[5]

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[4]In the 1974-75 school year Philbrook was granted three days of paid leave and seven days of unpaid leave. (P.X. 14)

[5]It should be noted that the petitioners are not arguing that because Philbrook has not been discharged, Title VII is inapplicable. Employment discrimination cases decided by this Court make it clear that Title VII is not only concerned with discrimination resulting in discharge, but also with deprivations effecting "terms, conditions, or privileges of employment." See, *Meritor Savings Bank, FSB v. Vinson*, — U.S. —, 106 S.Ct. 2399 (1986).

CONCLUSION

For the foregoing reasons and for the reasons set forth in their initial brief, the petitioners respectfully submit that this Court should reverse the judgment of the court of appeals and remand this case with instructions that Philbrook's complaint be dismissed.

Respectfully submitted,

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